No. 11092

In the United States Circuit Court of Appeals for the Ninth Circuit

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UNITED STATES OF AMERICA, FOR THE USE OF RECONSTRUCTION FINANCE CORPORATION, A FEDERAL CORPORATION, ACTING IN BEHALF OF DEFENSE PLANT CORPORATION, A FEDERAL CORPORATION, APPELLANT

v.

SAM BLOCK, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES

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CITATIONS

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No. 11282

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v.

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OPINION BELOW

The district court wrote no opinion.

JURISDICTION

This is a suit by the United States to condemn land in Los Angeles, California, under authority of section 5d (5) of the Reconstruction Finance Corporation Act of January 22, 1932, c. 8, 47 Stat. 5, as added by the Act of March 27, 1942, c. 198, 56 Stat. 174, 15 U. S. C. sec. 606b (5), and Title II of the Second War Powers Act of March 27, 1942, c. 199, sec. 201,

56 Stat. 176, 177, 50 U. S. C. App. sec. 632, as extended by Executive Order 9217, August 7, 1942, 7 F. R. 6177, 50 U. S. C. App. following sec. 632. The district court had jurisdiction under Title II of the Second War Powers Act, *supra,* and section 1 of the General Condemnation Act of August 1, 1888, c. 728, 25 Stat. 357, 40 U. S. C. sec. 257. The judgment appealed from was entered September 17, 1945 (R. 45–51). The Government's motion for a new trial was denied on October 2, 1945 (R. 54). Notice of appeal was filed December 28, 1945 (R. 57). This Court has jurisdiction of the appeal under section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a).

QUESTIONS PRESENTED

The United States condemned an area of land constituting a producing oil field. The questions are presented—

1. Whether the condemnation petition, in describing designated "lands", included the well casings, derricks and other fixtures comprising the operational equipment on the land installed and used for the extraction of oil and, if not, whether an amendment to the petition specifically describing such operational equipment related back to the date of taking the land.

2. Whether the trial court erred in admitting and in refusing to strike separate evidence of the market value or reproduction cost of such casing, derrick, and other fixtures comprising the operational equipment.

3. Whether the verdict and judgment entered thereon are supported by competent evidence.

STATEMENT

This is a suit by the United States, for the use of Reconstruction Finance Corporation, acting in behalf of its subsidiary, Defense Plant Corporation,[1] both federal corporations, to condemn real property in the City of Los Angeles, California. The property, consisting of a largely depleted oil field known as the Playa Del Rey field, was taken for use as a natural gas storage reservoir (R. 24). The field comprises 278 parcels,[2] occupied by over 40 wells (cf. R. 31–33). Involved here are parcels designated as numbers 87 and 103, which were subject to an oil lease held by appellee Block and were occupied by a well known as Block Well No. 10, formerly Colly Well No. 1 (R. 43). These parcels are parts of blocks numbered 13 and 14 of Tract No. 9809, as shown in Los Angeles County records (R. 42).

On September 18, 1942, the Board of Directors of Reconstruction Finance Corporation, at the request of Defense Plant Corporation, adopted a resolution to request the Attorney General to institute condemnation of described "lands," the Playa Del Rey field (Pltf. Exh. 1, R. 273). On October 19, 1942, an amendatory resolution was adopted, providing for

[1] This corporation was merged with the Reconstruction Finance Corporation by Publ. No. 109, 79th Cong., 1st sess. (June 30, 1945).

[2] So far as practicable, enumerations of parcels and parties not involved on this appeal have been omitted from pleadings and orders in the record on appeal. However, the record as printed does not indicate where such omissions have been made.

execution of a declaration of taking and estimating just compensation at $740,469 (Pltf. Exh. 2, R. 73). Pursuant to request made on September 19, 1942, (R. 80) the Attorney General on September 28, 1942, filed a complaint to condemn the full fee simple title, subject to existing public utility easements, of "lots, pieces or parcels of land" described by lot and block numbers (R. 2). An order for immediate possession was requested and entered on the same day, describing the property in the same terms (R. 11), and on the next day Defense Plant Corporation took possession of the land and of the oil wells thereon, including the derricks, casing, tubing in the wells, pumping machinery and all other fixed equipment (R. 33). On October 26, 1942, the United States filed its declaration of taking, executed by Reconstruction Finance Corporation, pursuant to the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. sec. 258a (R. 14).

Question was raised as to whether the derricks and other oil well equipment were included within the original resolution and complaint. Accordingly, on October 4, 1943, the directors of Reconstruction Finance Corporation adopted a resolution amending their resolution of September 18, 1942, by enumerating and expressely including the structures and improvements attached to the land (Dft. Exh. B, R. 276). Pursuant thereto an amended complaint was filed on January 12, 1944 (R. 22), expressly including and enumerating the same improvements, referring to them for purposes of identification as "personal property and trade fixtures," but preserving the conten-

tion that they were in fact part of the real estate (R. 28). Defendant Block filed his amended answer on June 29, 1945 (R. 41), alleging that taking of the personal property was not authorized or requested until about October 24, 1943. He alleged that his oil lease on parcels 87 and 103 was worth $35,000; that he also owned royalty rights of $10\frac{7}{12}\%$ in the production from those parcels, worth $6,500; and that the personal property and trade fixtures owned by him were worth $20,401.01 on October 24, 1943, and January 12, 1944.

The case came on for trial on July 24, 1945, as to the interests of appellee Block. Preliminary hearing was had (R. 69–122) on appellant's contentions that the oil well improvements were within the scope of Reconstruction Finance Corporation's resolutions of September 18 (Pltf. Exh. 1, R. 273) and October 19, 1942, (Pltf. Exh. 2, R. 73) and the original complaint (R. 2), although those referred in terms only to "lands," and that in any event the amendatory resolution of October 4, 1943 (Dft. Exh. B, R. 276), and the amended complaint filed January 12, 1944 (R. 22), adopted and ratified the action of Defense Plant Corporation in taking possession of the improvements along with the land on September 29, 1942. Appellee contended that taking of the improvements was not authorized or effective until the resolution of October 1943 was adopted (R. 41–42). Appellant, in support of its second contention, that the resolution of October 1943 was a retroactive ratification of the prior seizure of improvements, offered in evidence a telegram from the secretary of Reconstruction Finance

Corporation stating that the resolution was so intended (Pltf. Exh. 3 for identification, R. 77). That evidence was excluded by the court on the ground that it was a statement of a conclusion as to the legal effect of what had been done (R. 76). That ruling is specified as error on this appeal. After this argument the court proceeded with the taking of evidence without announcing any ruling on the question of whether the original taking of land included the improvements. However, its subsequent rulings in the course of the trial were predicated on its conclusion that the improvements were separately taken at a later date than was the land on which they stood (cf. R. 223).

Appellee Block was his own first witness (R. 134–175). He testified that his leasehold, which was subject to a landowner's and overriding royalty of 30% of production (R. 132), was worth $35,000 in September 1942 (R. 139). He testified that the value of the improvements (including two tanks inadvertently omitted from the list attached to the amended complaint) was $22,000 and was not included in the $35,000 valuation of the lease (R. 139). However, his valuation of the lease was based on anticipated production (R. 141), which, of course, involved use of the improvements (R. 149, 151). He conceded that his valuation was merely what the lease was worth to him, rather than what a willing buyer would pay for it in the market (R. 157).

Mr. Rubin, appellee's next witness (R. 175–182), testified that he thought that he had valued the improvements inventoried in the amended complaint at

$22,000 as of October 1943 (R. 178). The court overruled appellant's objections that the improvements were taken in September 1942 so that valuation should be as of that time, and that it was improper to receive evidence of their value apart from the value of the leasehold interest as a whole (R. 177).

Appellee next produced Mr. Crown (R. 182–186, 229–264), who valued the leasehold, excluding the improvements, at $11,000 (R. 185), to which he would add the salvage value of removable casing (R. 230–231). His valuation was as of September 1942 (R. 184, 231) and was based on his estimate of future production (R. 242–247, 250–251) and his opinion of the market demand for such investments (R. 248).

Appellee's third witness, Mr. Rush (R. 209–229), valued the improvements as of October 1943 at $18,000 (R. 211–212). Appellant's objections to separate valuation apart from the leasehold as a whole and to valuation at a date other than September 1942 were overruled by the court, which stated that the sole justification for receiving evidence of the separate value of the improvements was that they were taken on a later date than the interests in the land (R. 211–212; cf. R. 223). Mr. Rush then testified that the value of the improvements would have been the same in September 1942, and that only $12,260 worth of them could be recovered (R. 226).

For appellant, Mr. Oliver (R. 279–394) valued the leasehold at $5,650 (R. 284), as of September 28, 1942. His valuation of the lease included $3,150 for recoverable oil and $2,500 net salvage value of equipment

(R.284). His estimate of future oil production was derived from the past record of the well, shown by Plaintiff's Exhibit 8 (R. 292–293). He testified that the value of the operational equipment was substantially the same on October 4, 1943, as on September 28, 1942 (R. 320).

Appellant's second witness, Mr. Wents (R. 394–423), fixed the market value as of September 28, 1942, of future oil production at $2,700 for the leasehold (R. 401). Including the ultimate net salvage value of the improvements, he reached a value for the leasehold of $5,690 (R. 398).

In rebuttal, appellee introduced Mr. Owens, who testified that the cost of abandonment of the well would be $800 (R. 427), but admitted that it would cost from $800 to $1,000 additional to cover the holes and clean up the property (R. 429–430), which was required by the terms of the lease (Pltf. Exh. 7, R. 278).

Evidence was also introduced as to the value of the $10\frac{7}{12}\%$ royalty interest which Mr. Block had acquired, the parties agreeing that this interest should be valued separately from the lease (R. 129–130, 133). For the condemnee, Mr. Block valued it at $6,000 (R. 140), Mr. Crown at $3,120 (R. 231). For the Government, Mr. Oliver valued this interest at $1,388 (R. 283) and Mr. Wents at $1,168 (R. 398). The jury valued this interest at $1,857 (R. 490).

At the conclusion of the evidence appellant moved to strike all testimony as to market value of the improvements as of October 4, 1943, and requested that the jury be instructed to disregard such testimony (R. 431–432). Both motions were on the ground that the

evidence duplicated values included in the appraisals of the leasehold which were based on the value of oil to be produced by use of the same improvements (R. 431–432). The motion was denied (R. 433). The court's only instruction to the jury on this point was as follows (R. 477):

> In determining the fair market value of the leasehold estate and the production facilities and equipment used in connection with the operation of the well, you are to determine such value on the basis of the use of the facilities and equipment as an integral and necessary part of the said well in the production of oil therefrom.

The verdict, which had been approved as to form by counsel for both parties (R. 435), was as follows (R. 490):

> We, the Jury in the above-entitled case, find the market value as of September 28, 1942, of the leasehold estate of the defendant Sam Block, including all the production facilities and equipment used on said date in the operation of the well, to be the sum of $20,397.00.
>
> We further find the market value as of September 28, 1942, of the $10\frac{7}{12}$ per cent overriding royalty of the defendant Sam Black to be the sum of $1,857.00.
>
> Total market value of the foregoing as of September 28, 1942, is $22,254.00.

Judgment was entered thereon on September 17, 1945 (R. 45). On September 21, 1945, appellant filed a motion for new trial (R. 51), on the ground that the verdict was not supported by the evidence and repeat-

ing the objection to admission of evidence of the separate value of the improvements (R. 52). That motion was denied by the court on October 2, 1945 (R. 54). Notice of appeal was filed December 28, 1945 (R. 57).

SPECIFICATION OF ERRORS

1. The district court erred in admitting separate evidence of the market value or reproduction cost of improvements affixed to the land condemned, and in overruling appellant's objections thereto, as follows:

> (Testimony of Abraham Rubin.)
>
> Q. And what in your opinion was the fair and reasonable market value of that personal property?
>
> Mr. WEYMANN. Just a moment, please.
>
> Mr. DECHTER. As of——
>
> Mr. WEYMANN. Pardon me. I am going to have an objection before the question is asked.
>
> Mr. DECHTER. As of October of 1943.
>
> Mr. WEYMANN. I object to the question as incompetent for two reasons. In the first place the date of the valuation is not of October, 1943; on the second ground that the property taken is to be valued as a whole, as a unit, and that it is improper to introduce evidence of separate elements which go to make the valuation of the entire property taken.
>
> The COURT. You make no objection then, Mr. Weymann, that the date of January 12, the filing of the amended complaint, is not used in any way?
>
> Mr. WEYMANN. No. I make no objection to that. I make objection, of course, to the date of October, 1943.

The COURT. Yes. Your position is that it should be September 28, 1942?

Mr. WEYMANN. Yes, of the valuation of that property as a whole without separate valuation of any of the elements that go into it.

The COURT. The objection is overruled.

Mr. WEYMANN. May I have an exception, please?

The COURT. Yes.

The WITNESS. Do you want the answer in dollars and cents?

Mr. DECHTER. Yes.

The WITNESS. I don't remember the exact total, but I went over those figures at that time and it seemed to me it was over $22,000. I can't give you the exact figure.

Q. By Mr. DECHTER. It was about $22,000?

A. Yes; over $22,000 was the total as near as I can recall.

* * * * *

Mr. WEYMANN. May we have an exception to all questions along this line?

The COURT. Now, Mr. Weymann, I think to make an objection now such as that would not quite reach the question which is now before the court or before the witness for his answer. I have no objection if it is agreeable to Mr. Dechter that it be understood that your general objection is to go to all of these questions.

Mr. WEYMANN. That is the purpose of the objection.

Mr. DECHTER. I will so stipulate, your Honor.

The COURT. Yes. The general objection you made that you referred to heretofore?

Mr. WEYMANN. That is correct. I simply don't want to be objecting to every particular question.

The COURT. I think that is very proper, but I want to be sure it refers only to the general objection.

Mr. WEYMANN. To the general objection, that is correct.

The COURT. The objection is overruled.

Mr. WEYMANN. Exception, please.

(R. 176–179.)

(Testimony of J. D. Rush.)

Q. You have heretofore been shown an inventory of personal property located on what is known as Block Oil Company Well No. 10, being pages 1 to 4, inclusive, of Plaintiff's Exhibit C of Plaintiff's Amended Complaint? A. Yes, sir.

Q. And you have been asked to look that over for the purpose of expressing an opinion as to the fair market value thereof? A. Yes, I have.

Q. And do you have an opinion as to the fair market value of that property as of October 1943? A. Yes.

Q. And will you please state to the court and jury what that opinion is?

Mr. WEYMANN. Just a moment, please. I object to the testimony on the ground that it is incompetent, irrelevant and immaterial. On the further ground that a separate valuation may not be given for any of the elements comprising the property which is taken; that under the cases I would like to cite to your Honor, particularly the case of Morton Butler Timber Company v. United States, 91 Fed. (2d), that

is in the Sixth Circuit, a separate valuation of the component parts of the property taken is not an element of the fair market value. And on the further ground that the date of valuation is the date on which this property was taken over by the United States, to-wit, September 28, 1942.

The COURT. I didn't hear the last part.

(The record was read.)

The COURT. Well, the objection is overruled, and, Mr. Weymann, with regard to the matter of separate valuation, as far as the date is concerned, that is the only basis in the opinion of the court for the separate valuation; that is, one should be considered as of the 28th of September 1942, that is, the real property, and this remaining part, the personal property and equipment, that that should be considered as of either October 1943 or of January 12, 1944. Mr. Dechter has asked the question as of October 1943, and you have made no objection as to any differentiation between October 1943 and January 1944, so the court believes that the only reasonable way that this jury may be able to arrive at the total valuation is to take the separate valuation of those parcels, one as of September 28, 1942, and the other as of October 1943. Of course, in the final valuation; that is, the fixing of it by the jury, there must be a total amount; but for the matter of compiling that or arriving at it, it would have to be taken separately, and this only because of the different dates.

I make that in explanation of the ruling of the court.

Mr. WEYMANN. Thank you, sir. May we have an exception?

The COURT. Yes. Mr. Dechter, in order that the court may be clear, your position is the same as stated by the court?

Mr. DECHTER. That is correct, your Honor.

Q. By Mr. DECHTER. Do you want the question read, Mr. Rush, or do you have it mind?

A. I have it in mind.

Q. By Mr. DECHTER. Will you please give us what your opinion is of the value of this personal property, machinery, and fixtures as of October 1943?

A. Approximately $18,000.

(R. 210–212.)

* * * * *

The COURT. Well, I think, Mr. Dechter, you could ask the witness and should ask him what he considered the valuation of the equipment less the casing which could not be removed.

Mr. DECHTER. Yes, your honor.

Q. By Mr. DECHTER. Mr. Rush, what, in your opinion, would be the fair market value of the personal property described on pages 1 to 4 of the inventory, Exhibit C of the amended complaint, eliminating therefrom the 5,300 feet of 7-inch casing that you say could not be removed in the event the well was abandoned, and eliminating the 306 feet of 5¾-inch liner in October of 1943?

A. Could I have a piece of paper, please?

(A sheet of paper was handed to the witness.)

A. $12,260.00.

The COURT. Have you finished?

Mr. DECHTER. Yes, your Honor.

The COURT. Mr. Rush, was there any substantial difference in the value of the equipment which you have said was valued at $12,260.00 in October of 1943, was there any difference between that value and what the value was of the same equipment September 28, 1942?

The WITNESS. No, there wasn't any substantial difference.

(R. 225–226.)

2. The district court erred in denying appellant's motion to strike the foregoing evidence and in refusing appellant's request to instruct the jury to disregard such evidence, as follows:

Mr. WEYMANN. The plaintiff now moves to strike, and requests the court to instruct the jury to disregard all testimony as to the market value, as of October 4, 1943, of any oil or gas production equipment and facilities, which on September 28, 1942, were located on the leasehold property of the defendant and were then by him used in the production of oil and gas from the producing well known as Blocks Well No. 10, located on defendant's sublease in this proceeding.

The motion is based upon the following grounds:

1st. That under defendant's pleadings he demands compensation for an oil and gas sublease with a producing well thereon as a producing unit; that issue was joined and defendant introduced evidence as to value under that state of facts.

2nd. That separate valuations of portions of a single producing unit, to-wit, of the oil and

gas sublease of the defendant with a producing well thereon and of the equipment and facilities connected with said well and necessary to produce the same is not permissible under the law.

3rd. That it conclusively appears from the uncontroverted evidence that the oil well producing equipment, as to which the witnesses, Block, Rubin, and Rush, testified on market value as of October 4, 1943, were absolutely necessary to the continued operation of said Block Well No. 10, and that without said or similar equipment said well would not be a producing oil and gas well, but a mere hole in the ground lined with 5,300 feet of 7-inch casing and 306 feet of 5¾-inch liner.

4th. That it further appears from all the testimony introduced by defendant as to the market value of defendant's oil and gas sublease as of September 28, 1942, that this value was predicated upon the continued operation of and production from Blocks Well No. 10, and the continued use of all of defendant's operating and producing facilities and equipment which were in, on, or connected with said well on September 28, 1942.

5th. That to permit a valuation of and an award to the defendant for his leasehold estate with the well thereon as an operating property which was capable of producing oil and gas in commercial quantities over a period of years, after the government took possession, by using the equipment and facilities which were connected with and used on the Block Well on September 28, 1942, and to make a separate and additional award for the market value of the same equipment as of October 4, 1943, would

result in a duplication of compensation to the defendant in this: that the defendant would receive the full market value of a producing oil and gas well consisting of the potential future recovery of oil and gas through the well, and of the facilities and equipment necessary for such recovery, and a separate and additional award for the same facilities and equipment which were a part of the producing well and constituted one of the elements of its value as such.

Mr. DECHTER. Your Honor, this is nothing more than a repetition——

The COURT. The court is ready to rule, Mr. Dechter.

I think the motion should be denied and it is denied.

Mr. WEYMANN. May we have an exception, please?

The COURT. Yes. I think, Mr. Weymann——

Mr. WEYMANN. Pardon me?

The COURT. I was just going to say the court didn't have the benefit of all that particular objection at the time the objection was made. That is, the motion that you make to strike is in so much more particularity than the objection was made that the court had to rule upon the objection as it was made and based.

In addition to that, I think by granting that motion there is a certain part of the testimony that you would be asking to strike which was elicited by the plaintiff itself. My recollection on that point is just general; it may not be accurate; but in any event the court denies the motion, and you have your exception.

(R. 431–433.)

3. The district court erred in entering judgment on the verdict.

4. The district court erred in denying appellant's motion for a new trial.

5. The district court erred in excluding from evidence Plaintiff's Exhibit No. 3 (for identification), as follows:

> Mr. WEYMANN. I am just submitting to Mr. Dechter a document for his inspection. I offer as Plaintiff's exhibit next in order a telegram from Leo Nielson, Assistant Secretary of the Reconstruction Finance Corporation, to Eugene D. Williams, Special Assistant to the Attorney General, telegram being dated March 26, 1945.
>
> Mr. DECHTER. To which we will object, your Honor, on the ground that it is incompetent, irrelevant, immaterial, being a self-serving declaration and attempting to usurp the province of the court in construing the legal steps theretofore taken by the plaintiff and trying to cast plaintiff's own construction on those legal steps which it is the duty of this court to determine in this matter.
>
> The COURT. May I see it?
>
> Mr. Weymann, the court is inclined to sustain that objection. It sounds as though it is properly based, but I would like to hear from you.
>
> Mr. WEYMANN. The matter which the court is now called upon to pass upon is to determine what the Reconstruction Finance Corporation really did when it authorized the bringing of this action. That is not a self-serving declaration, but it is an explanation of what Reconstruction Finance Corporation meant by what it did. In other words, it is an interpretation, or

rather a statement of what the Reconstruction Finance Corporation had in mind when it passed those resolutions.

The COURT. I think the objection is good. It says here particularly that certain proceedings have been properly construed by justice as an adoption and ratification. It may be marked for identification.

Mr. WEYMANN. Thank you. May I have an exception:

The COURT. Yes.

(Whereupon, the document referred to was marked as Plaintiff's Exhibit No. 3, for identification.)

PLAINTIFF'S EXHIBIT No. 3

(For Identification)

Received Mar. 26, 1945. Lands Division, Los Angeles, California.

GA
SN74 249 Govt.
WUX Washington DC Mar 26 1250P 1945

EUGENE D WILLIAMS
Special Asst to Attorney General

Re Playa Del Rey Gas Storage Project. Amendatory Resolution Adopted by Directors Reconstruction Finance Corporation October 4 1943 Authorizing Amendment to Petition in Condemnation Proceedings Number 2454–B Civil to Include Certain Items of Property Designated As Personal Property Located on Lands Covered in Declaration of Taking Filed in Said Proceedings Has Been Properly Construed by Justice As An Adopted and Ratifi-

cation of Act of Defense Plant Corporation in Taking Possession on September 28, 1942 of Property Listed in Exhibit C of Amended Petition in Condemnation in Connection with Taking Possession of Land Covered by Such Declaration of Taking. At Time Declaration of Taking Was Filed Necessity for Taking Some of Items Described in Said Exhibit C Could Not Be Determined As Defense Plant Corporation Had No Way of Knowing What Items of Property Were Located on Site or Would Be Required in Connection with Operation of Project, and Some of Items Included in Exhibit C, including Oil Drilling Equipment, Were Thought to Be Part of Realty So As to Have Been Acquired Upon Filing of Declaration of Taking. Reconstruction Finance Corporation Did Not Delete Any of Items in Inventory Furnished by Representatives of Defense Plant Corporation Which Inventory Was a List of All Property Known to Be on Lands Taken Except Certain Items of Property Which Were Determined Prior to Adoption Amendatory Resolution of October 4, 1943 Not to Be Required in Connection with Project and with Respect to Which Arrangements Had Been Made for Release to Former Owners

LEO NIELSON
Asst Secretary

4 1943 2454–B 28 1942 C 4 1943
1023 AM
RCD SN 74 TNX
(R. 75–78.)

ARGUMENT

I

The improvements used in producing oil such as well casings and derricks were taken in September 1942

A. The improvements were condemned as of September 28, 1942, under the original complaint

There can be little doubt that the improvements here involved were fixtures which in legal contemplation were part of the real estate. They consisted of a derrick, casing cemented into the well, tubing therein, tanks and machinery, all connected and forming a single operating unit (R. 92–93). Both this Court and the Supreme Court of California have squarely held that precisely such improvements are real and not personal property under California law.

In *Big Sespe Oil Co.* v. *Cochran,* 276 Fed. 216 (C. C. A. 9, 1921), a sheriff's deed on execution sale of oil land was set aside as violative of the judgment debtor's right of redemption. Only real property can be redeemed, under Cal. Code Civ. Proc. sec. 700a, and the judgment purchaser argued on appeal that his purchase was valid at least as to the "personal property, machinery, and fixtures." This Court rejected that contention, holding (p. 225) that the equipment which had been so designated, consisting of derricks, camp houses, pump house, wells and tanks, was legally real and not personal property. Similarly, in *Cortelyou* v. *Baker,* 182 Cal. 168, 187 Pac. 417 (1920), where the owner of equipment used in the operation of two oil wells sued a sheriff who had sold it on execution issued against a third person, the court held that

all the equipment except loose tools was real property, as to which the owner's rights were protected without the filing of a third party claim required in the case of personal property. So, too, although a mechanics' lien attaches only to real property, *R. Barcroft & Sons Co.* v. *Cullen,* 217 Cal. 708, 20 P. 2d 665 (1933), it will attach to an oil rig even when the land on which it stands is separately owned and is protected from the lien by a notice of non-responsibility filed by the landowner. *Cain* v. *Whiston,* 58 Cal. App. 2d 738, 137 P. 2d 479 (1943).

These decisions conform to the California Civil Code which provides, sec. 658, that real or immovable property consists of land, that which is affixed to land or incidental or appurtenant to it, and that which is immovable by law, and, sec. 660, that "A thing is deemed to be affixed to land when it is attached to it by roots * * *; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws; * * * ." California legislation dealing specifically with oil wells reflects a view that improvements to them are real property within the meaning of these sections. Thus Bus. & Prof. Code, sec. 7043, provides that regulation of building contractors "does not apply to any construction, repair or operation incidental to the discovering or producing of petroleum or gas, or the drilling, testing, abandoning or other operation of any petroleum or gas well, when performed by an owner or lessee," plainly indi-

cating that such work is subject to regulation when performed by others, although section 7046 exempts all "construction, alteration, improvement or repair of personal property." Again, Publ. Res. Code, sec. 3233, providing for approval by the State Oil and Gas Supervisor of removal from an oil well of any rig, derrick, other operating structure or casing, seems inconsistent with a view that such equipment is personal property, and might be said to make it, in the absence of such approval, "immovable by law" within the meaning of Civ. Code, sec. 658, *supra.*

The improvements in the present case plainly show why oil well equipment is held to be real property. They include casing extending 6,300 or 6,400 feet into the earth, cemented in so that only 800 or 900 feet can be removed (R. 217, 221). It is difficult to conceive of anything more thoroughly "imbedded" within the meaning of Civ. Code, sec. 660, *supra.* While other components of the oil well are not so irretrievably affixed to the land, the well as a whole constitutes a unit which is attached with such permanency as to be a fixture within section 660. Cf. *Southern California Tel. Co.* v. *State Board of Equalization,* 12 Cal. 2d 127, 82 P. 2d 422 (1938). "In order to make an article a permanent accession to the land its annexation need not be perpetual. It is sufficient if the article shall appear to be intended to remain where fastened until worn out, until the purpose to which the realty is devoted has been accomplished or until the article is superseded by another article more suitable for the purpose." *San Diego*

Trust & Savings Bank v. *San Diego County,* 16 Cal. 2d 142, 151, 105 P 2d 94 (1940), citing 26 C. J. 657.

Appellant as a condemner is of course not affected by the lease provision giving appellee the privilege of removing "personal property and equipment" placed on the premises (R. 123). "Trade fixtures are regarded as personalty as between the tenant and owner [of the land] so far as the right of removal is concerned, but as between the tenant and the condemning party they are regarded as a part of the realty for the purpose of making compensation, so long as they remain fixtures * * * ." *People* v. *Klopstock,* 24 Cal. 2d 897, 903, 151 P. 2d 641 (1944); *City of Los Angeles* v. *Klinker,* 219 Cal. 198, 209, 25 P. 2d 826 (1933); *city of Los Angeles* v. *Hughes,* 202 Cal. 731, 262 Pac. 737 (1927). This is simply one phase of the general rule that despite an agreement to treat fixtures as personal property they remain real property as to third persons, such as taxing bodies, *Trabue Pittman Corp.* v. *County of Los Angeles,* 28 Adv. Cal. 1, 168 P. 2d 156 (1946), mechanics' lien claimants, *R. Barcroft & Sons Co.* v. *Cullen,* 217 Cal. 708, 20 P. 2d 665 (1933), or subsequent purchasers or encumbrancers without notice, *Dauch* v. *Ginsburg,* 214 Cal. 540, 544, 6 P. 2d 952 (1931).

The California law thus is plain that, regardless of any contrary agreement which may be effective as between the parties to it, oil well improvements, whether or not they are trade fixtures, must be considered real property so far as a condemnor is con-

cerned. The Supreme Court has held that the meaning of "property" as used in federal condemnation statutes and the Fifth Amendment is a federal question, but will normally obtain its content by reference to local law. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 279 (1943). Following that principle, it was held in *United States* v. *19.86 Acres of Land in East St. Louis,* 141 F. 2d 344 (C. C. A. 7, 1944), that a building was "land" within the applicable condemnation authorization, when it would have been so regarded by local law in spite of the fact that the landowner had entered into a contract for its sale as personal property, apart from the land. See *United States* v. *Becktold Co.,* 129 F. 2d 473, 477 (C. C. A. 8, 1942); cf. *Reconstruction Finance Corporation* v. *County of Beaver,* 90 L. Ed. (Adv.) 919 1946). In any event, there does not appear to be any conflict between federal and state law since there are no federal decisions indicating that the oil production equipment is personal property and not part of the realty.

Since the improvements here involved are thus real property for the purposes of this condemnation, they must be considered to be within the scope of Reconstruction Finance Corporation's resolutions of September 18 (R. 273) and October 19, 1942 (R. 73), and the original complaint filed September 28, 1942 (R. 2) although those refer only to "lands." "The State's appropriation of land, unless qualified when made, is an appropriation of all that is annexed to the land whether classified as buildings or as fixtures." *People* v. *Klopstock,* 24 Cal. 2d 897, 903, 151 P. 2d 641 (1944); *United States* v. *Becktold Co.,* 129 F.

2d 473, 476–477 (C. C. A. 8, 1942)); *Jackson* v. *New York,* 213 N. Y. 34, 106 N. E. 758 (1914); 1 McAdam, *Landlord and Tenant* (5 ed., 1934), sec. 10, pp. 23–25. The pleadings in federal condemnations must conform to the state practice. General Condemnation Act of August 1, 1888, c. 728, 25 Stat. 357, as amended, 40 U. S. C. sec. 258. Since an unqualified complaint to condemn land has thus been declared by the Supreme Court of California to embrace all buildings and fixtures annexed to the land, such a pleading must likewise be held sufficient for that purpose in the federal courts within the state.

Moreover, the record in the present case shows that Reconstruction Finance Corporation manifestly intended that this condemnation should include the improvements. The complaint sought an order of immediate possession and such order was granted (R. 10–13). It would be absurd to suppose that the Government was thereby seeking to take possession of only the land and not the well casings, derricks and other operational equipment permanently affixed to it. In fact, it would have been physically impossible to do so.[3] The declaration of taking (R. 14) which the Corporation executed on October 22, 1942, within a few days of its resolutions of September 18 (R. 273) and October 19, 1942 (R. 73), and with reference to them and to the original complaint

[3] Since possession was taken of the equipment some of the condemnees in the Playa Del Rey field pursuant to their theory that the equipment was not included in the condemnation proceeding have brought suits against the Government's contractors in the California state courts. See *United States* v. *Certain Parcels of Land,* 62 F. Supp. 1017 (S. D. Cal., 1945).

filed September 28, 1942 (R. 2), states the estimated just compensation "for said lands with all buildings and improvements thereon and all appurtenances thereto," which sum was therewith deposited in court (R. 15). Certainly the condemnor would not have deposited compensation for improvements if it did not intend to acquire them under the condemnation.

When the United States condemns land in fee, the compensation which it pays does not include the cost to the condemnee of removing his personal property. *United States* v. *Petty Motor Co.,* Nos. 77–83, October Term, 1945, decided February 25, 1946; 90 L. Ed. (Adv.) 526, 530. In the present case it may be that the condemnees would have been willing to bear the expense of dismantling and removing their oil rigs, in view of the unusual market for used equipment at the time of the taking (cf. R. 172–173); but it may readily be imagined that under more normal market conditions condemnees would be the first to complain of a rule that would leave them saddled with the burden of removing and disposing at their own expense of improvements of the sort here involved. When, as here, abstract legal principles, specific decisions, practical considerations, and manifested intent all unite to indicate that the improvements were taken with the land, there can be no justification for a contrary conclusion.

B. In any event the improvements were condemned as of September 1942 under the amended complaint

Under the court order of September 28, 1942, giving immediate possession (R. 11), Defense Plant Corpo-

ration took possession of the improvements along with the land (R. 33). On October 4, 1943, Reconstruction Finance Corporation amended its original resolution for condemnation by expressly including and enumerating the improvements (Dft. Exh. B, R. 276), and the amended complaint pursuant thereto was filed January 12, 1944 (R. 22). If for any reason it should be concluded that the original complaint for condemnation of the land did not include the improvements affixed to it, nevertheless the amended complaint thereafter brought them within the scope of the condemnation. This Court has recognized the propriety of an amendment to a complaint in condemnation "for greater definiteness and certainty and so as to make provision for just compensation for any interest in the property taken by the United States," *United States* v. *Carey,* 143 F. 2d 445, 448 (1944), and an amended complaint, of course, speaks as of the date of the original complaint. *United States ex rel. Texas Cement Co.* v. *McCord,* 233 U. S. 157, 164 (1914); *Campbell* v. *Johnson,* 167 Fed. 102, 104 (C. C. A. 9, 1909).

Another reason why the amended complaint must be deemed to relate back to include the improvements in the original taking is that where possession is taken before a complaint in condemnation is filed, the date of possession is the date of taking in condemnation. *United States* v. *Rogers,* 255 U. S. 163 (1921); *Bank of Edenton* v. *United States,* 152 F. 2d 251 (C. C. A. 4, 1945); cf. *United States* v. *Lynah,* 188 U. S. 445, 470 (1903). Even where the original taking of possession

was unauthorized, if it is later approved the approval relates back to the original date, which is then considered the date of taking for the purpose of determining compensation. *Shoshone Tribe* v. *United States,* 299 U. S. 476, 496 (1937). Here, where Defense Plant Corporation took possession of both the land and improvements at the same time, when the suit was begun, and the case was tried under pleadings which included both the land and improvements, it should clearly have been held that this was a simultaneous condemnation of both.

In support of this contention, appellant offered in evidence a telegram dated March 26, 1945, from Leo Nielson, Assistant Secretary of Reconstruction Finance Corporation, to Eugene D. Williams, Special Assistant to the Attorney General (Pltf. Exh. 3 for identification, R. 77; *supra,* p. 19). The purpose for which this was offered in evidence was to show that it was the intention of Reconstruction Finance Corporation, in adopting the resolution of October 4, 1943, to ratify the prior seizure of the improvements. With regard to that, the telegram said:

> Amendatory resolution adopted by directors Reconstruction Finance Corporation October 4, 1943, authorizing amendment to petition in condemnation proceedings number 2454–B Civil to include certain items of property designated as personal property located on lands covered in declaration of taking filed in said proceedings has been properly construed by Justice as an adoption and ratification of act of Defense Plant Corporation in taking possession on September 28, 1942, of property listed in Exhibit

C of amended petition in condemnation in connection with taking possession of land covered by such declaration of taking (R. 77).

The court excluded this evidence on the ground that it was a mere expression of a legal conclusion drawn by Reconstruction Finance Corporation as to the effect of what had been done in the proceedings. The court called particular attention to the statement that the resolution had "been properly construed by Justice (i. e., the Department of Justice) as an adoption and ratification" (R. 76). It seems too obvious to require argument that Reconstruction Finance Corporation was not undertaking to advise the Department of Justice as to the legal effect of the proceedings viewed objectively, but rather was informing the Department of Justice that the latter had construed the resolution as the Corporation had intended it to be construed—in effect, that the resolution had been intended as a ratification, when enacted.

It has been held that a letter from the Acting Secretary of the Interior to the Attorney General, stating that the Secretary had reopened a particular claim, is conclusive proof of the fact so stated. *Rollins and Presbrey* v. *United States,* 23 C. Cls. 106, 124 (1888). So here, where the condemning agency could have requested condemnation of the improvements at any time, its statement to the Department of Justice that it had ratified an earlier seizure of them should have been admitted as some, if not indeed conclusive, evidence that such was the fact. The court erred in excluding it from evidence.

II

The trial court erred in admitting and in refusing to strike separate evidence of the market value or reproduction cost of the oil well improvements

When the United States condemns land, it must pay as compensation "the value of the land as enhanced, if at all, by any permanent structure that is upon it." *United States* v. *Becktold Co.,* 129 F. 2d 473, 476 (C. C. A. 8, 1942). It is entitled to have that value determined as a whole even when the land and fixtures are separately owned. *Meadows* v. *United States,* 144 F. 2d 751 (C. C. A. 4, 1944). Because the issue is the value of the property as an entirety, the court should admit only evidence of its value as a whole, and "separate appraisements of the different elements constituting the whole are improper." *United States* v. *Meyer,* 113 F. 2d 387, 397 (C. C. A. 7, 1940); *Morton Butler Timber Co.* v. *United States,* 91 F. 2d 884, 888 (C. C. A. 6, 1937); *Devou* v. *City of Cincinnati,* 162 Fed. 633 (C. C. A. 6, 1908). See *Kinter* v. *United States,* (C. C. A. 3, June 7, 1946).

Section 1246.1 of the California Code of Civil Procedure expressly provides that a condemnor is entitled to have the value of the whole determined in advance of its apportionment among the various condemnees. Stats. 1939, c. 210, p. 1456. Even before that enactment it was held that the evidence should be confined to the value of the property as a whole, and that it was improper to admit separate evidence of the value of the improvements. *City of Los Angeles*

v. *Klinker,* 219 Cal. 198, 211–212, 25 P. 2d 826 (1933); *Vallejo etc. R. R. Co.* v. *Home Sav. Bk.,* 24 Cal. App. 166, 173, 140 Pac. 974 (1914). The only modification of this rule is that provided by section 1872 of the Code of Civil Procedure, under which an expert witness may be asked on direct or cross examination to explain the reasons for his opinion. Stats. 1937, c. 565, p. 1605.

The foregoing principles were no less applicable to the trial of the present case by reason of the fact that the fee title was not under consideration. The improvements here involved "were fixtures to that interest in the realty in aid of the use of which they were affixed," that is, the oil leasehold. *Midland Oil Fields Co., Ltd.,* v. *Rudneck,* 188 Cal. 265, 270, 204 Pac. 1074 (1922).[4] Consequently, "the damage sustained by the respondent was to its leasehold interest with the improvements and fixtures thereon." *People* v. *Ganahl Lumber Co.,* 10 Cal. 2d 501, 511, 75 P. 2d 1067 (1938). The leasehold should have been valued as enhanced by the fixtures, and separate evidence of their market value should not have been admitted.

The trial judge apparently recognized the validity of this proposition (cf. R. 108–109), but nevertheless he overruled appellant's continuing objection and admitted separate evidence of the market value or reproduction cost of the improvements (R. 176–179, 210–212, 225–226; *supra,* pp. 10–15). In doing so he

[4] The equipment actually involved in that case was only placed on the land temporarily for drilling purposes, and was held properly to be considered personal property.

conceded that such evidence is ordinarily inadmissible, and stated that the only reason for allowing it in the present case was that the improvements were personal property, not fixed to the land or taken at the same time, and must be valued as of the time when they were taken (R. 211–212, 223). Later, he apparently accepted the view that all the property was taken on September 28, 1942 (R. 513–514), and instructed the jury to value the leasehold and equipment on the basis of use of the equipment as an integral part of the well (R. 477). Despite this change of view, however, he denied appellant's motion, made at the close of the case, to strike the separate evidence of the market value of the improvements, and refused appellant's request to instruct the jury to disregard such evidence (R. 431–433; *supra,* pp. 15–17).

The error of admitting separate evidence of value is especially clear here since the result is duplication of values.

Appellee argued that the lease should be valued by the sale price of the oil to be produced, less operating expenses, and that additionally "the equipment has a value all by itself" (R. 110), which is "what it would cost to replace these items as of the date the government was authorized to take it over. That is the value; not what the junk value would be or what the value would be for salvage purposes" (R. 222), so that "it is immaterial how much could be salvaged" (R. 215). Pursuant to that theory, appellee introduced evidence of the value of the operational equipment to himself (R. 139, 157), and of its "fair market

value" (R. 176, 178, 211–212), but no evidence of its salvage value. At the same time, his evidence of the value of the oil interest was based on the selling price per barrel of oil expected to be produced, less the royalty payments and operating expenses (R. 141, 247). Both appellee's witnesses on that subject asserted that the value so given did not include the operational equipment (R. 139, 185, 262), but the first, appellee himself, admitted that it was based on production by use of the operational equipment (R. 151). The same was obviously true as to the other witness, Mr. Crown (cf. R. 247), although the court refused to permit him to be questioned specifically on the point, mistakenly stating that it had already been gone into (R. 264). Appellee did not introduce any evidence of over-all value.

Oil production requires the use of equipment, and the operational equipment is therefore part of the property that is being valued when the lease is valued by the selling price of the oil to be produced. Of course, some of the equipment will also have a salvage value when production stops, and that must be considered in valuing the lease; but to add the present market value of the operational equipment to the value of the oil which will be produced by its use is pure duplication, to the extent that market value exceeds the present value of anticipated terminal salvage. To take the simplest illustration, a well is worth nothing more than the oil it will produce, regardless of what it would cost to reproduce its equipment, if the equipment will have no salvage value. Only to the extent that the equipment has sal-

vage value does it add anything above the value of the recoverable oil. Thus, to permit appellee to value the lease based upon oil production and at the same time to consider the market value of the operational equipment needed for such production is to value the same thing twice.

III

The verdict and judgment are not supported by evidence

The jury awarded $20,397 for the leasehold interest, including the equipment used in operation of the well on September 28, 1942 (R. 490). Appellant submits that the verdict was not supported by evidence, and that therefore it was error to enter judgment upon it, and was an abuse of discretion to deny appellant's motion for new trial made on that ground. The Government's estimates of leasehold value were $5,650 and $5,690 (R. 284, 398). Since appellee's only evidence was based upon separate valuation, there was obviously no evidence to support the verdict if that evidence were excluded, as we contended should have been done (*supra*). But even if the evidence of separate value is considered it does not support the verdict.[5]

Appellee's witness Crown valued future oil production at $11,000 (R. 185). As already pointed out, the testimony of appellee's witnesses as to the market value, or reproduction cost of the operational equipment would duplicate to an undisclosed extent the values included in the oil to be produced, and so cannot be used here. How-

[5] Of course, a jury verdict which is beyond the range of any evidence cannot stand. *United States* v. *685.2 Acres of Land in Lake County*, 146 F. 2d 998 (C. C. A. 7, 1945).

ever, appellee's witness, Rush, did testify that the market value of the equipment, excluding that which could not be recovered at all, was $12,260 (R. 226).[6] Of course, no salvage could occur until the end of the ten-year period shown by appellee's evidence as the period of production (R. 141, 244), and money to be realized in the future must be discounted to establish its present value. Appellee's only witness on that subject was Mr. Crown, who testified that 6% was a suitable discount rate, resulting in a present value of 59.2¢ for a dollar payable ten years hence (R. 247, 250).[7] The sum of $12,260 to be recovered in ten years would have a present value of $7,257.92. This, added to Mr. Crown's valuation of $11,000 for the present value of the oil production, amounts to only $18,257.92, substantially less than the jury award of $20,397. Moreover, it makes no allowance for the cost of abandoning the well, an expense of the lessee (R. 254–255, 278), which was estimated by appellee's witness Owens at from $1,600 to $1,800 (R. 427, 430). Plainly, this evidence falls far short of sustaining the award.

Appellee himself testified that the oil production was worth $35,000 (R. 139), but he admitted that this was merely the value to himself and not what he thought a willing buyer would pay (R. 157). His testimony,

[6] That figure was the value of the equipment in place (R. 216), and would be considerably more than could be realized from it as salvage (cf. R. 408–409). However, it may be used for the sake of argument as a realizable salvage value.

[7] Witnesses for appellant testified that 8% (R. 324) or 10% (R. 400) would be more suitable, but again for the sake of argument we may accept appellee's evidence and use the rate most favorable to him, 6%.

therefore, should be wholly disregarded. It is well settled that compensation is to be measured by market value and not by value to the condemnee. *United States* v. *Petty Motor Co.,* Nos. 77–83, October Term, 1945 decided February 25, 1946, 90 L. Ed. (Adv.) 526, 530; *United States* v. *Honolulu Plantation Co.,* 122 Fed. 581, 584 (C. C. A. 9, 1903). Counsel for appellee recognized the incompetent character of this testimony, but urged that it be given weight as being based on a "sincere belief" (R. 439–440). Obviously, the sincerity of appellee's belief as to what the property was worth to him does nothing to improve the standing of that personal value as a measure of just compensation. The court clearly instructed the jury that it was not to measure the compensation by the special value of the property to the owner (R. 479–480). Appellee never purported to testify to any value other than one personal to him; it follows that his testimony cannot support the verdict.

Moreover, the process by which appellee arrived at his final figure was demonstrably erroneous. It was based upon continuance of the present rate of production which he said was 25 barrels a day (R. 137, 141). But the records of actual production show that it had been several years since an average production of 25 barrels a day was attained (R. 292–293). After estimating annual income he merely took ten times that amount, on the assumption that the income would continue for ten years (R. 141). No discount was made in order to reach a present value for this future income. Nor did Mr. Block make any deduction for the

cost of abandoning the well. This process of Mr. Block's rests on the absurd assumption that oil production would continue unabated up to the last minute of production, although it is obvious that, as his own witness Crown testified (R. 242) actual production follows a declining curve. It also rests on the assumption that value is the anticipated income without even discount for delay; although it is obvious that buyers will also leave a large margin to allow for various risks of operation, misappraisal, lowered prices, and so forth (cf. R. 304, 400). Under these circumstances we submit that Mr. Block's testimony even if it were admissible could not support the verdict.

The statements of Mr. Block and Mr. Rubin valuing the operational equipment at $22,000 (R. 139, 178) cannot support the verdict. Those estimates embraced all of the equipment on an inventory and represented O. P. A. prices (R. 163–165, 176–178). But as appellee's witness Rush, who valued the items on the inventory at $18,000, stated, many of the items could not be removed from the property and sold (R. 222–226). Rush valued the items that could be removed at $12,260 (R. 226). Thus, it is clear that appellee's valuations of the operational equipment did not represent a realizable market value but rather, as appellee's counsel put it (R. 222) the "cost to replace these items." In the case of property such as this where the only enjoyment lies in the realization of income the cost of replacing a portion of it cannot measure its value when the maximum realizable return is much less. Moreover, if the award for the lease is to be

supported by any theory of immediate rather than deferred salvage of the equipment, it will necessarily follow that no allowance can be made for the oil, since when the equipment is removed no oil can be recovered. A condemnee cannot claim a recovery for two inconsistent elements of value. *Roberts* v. *New York City,* 295 U. S. 264, 284 (1935). Immediate salvage of the equipment not only would have eliminated any oil value for the leasehold, but also would have eliminated all value of the royalty interest, since the royalty value depended entirely on oil production. The award for the royalty was $1,857 (R. 46, 490), which added to the award of $20,397 for the leasehold makes $22,254 in all, or more than the highest testimony as to the present replacement value of all the equipment. Thus, the view of the court below (R. 514) that the verdict might have been rested on the present value of the equipment was unsound.

It is thus apparent that the verdict cannot be supported by any single value testified to, or by any combination of values that can be combined with any logical justification. It must be concluded that the jury reached its excessive valuation by doing as appellee argued should be done, combining the value of oil to be recovered with the total reproduction cost of the improvements. As has been shown, an operator could never have realized that much from the property; therefore, an investor would never pay that much for it, and it is not its market value. But, however the jury may have arrived at its award, the award is unsupported by competent evidence.

CONCLUSION

It is submitted that the judgment appealed from should be reversed and the cause remanded for new trial.

Respectfully,

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